***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

# 75-1369

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 75-1369

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

MILTON PARNESS and BARBARA PARNESS,
*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## JOINT PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC


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## Questions Presented for Rehearing and Rehearing *En Banc*

An attorney, Campbell, was in charge of a special Strike Force Unit and, coincident with this case, was designated a Special Assistant United States Attorney in the Southern District of New York. He admittedly supervised and participated in the criminal investigation which led to the indictment herein. As such, he cultivated and secured the cooperation of Goberman, the "key" and indispensable prosecution witness. Additionally, he attended portions of the instant trial.

Following the indictment, and prior to trial, Goberman wrote nine letters directly to Campbell, and also wrote eleven letters to other attorneys, copies of which were sent to Campbell. He thus received a total of 20 Goberman letters. For the purposes of the District Court opinion, it was assumed that these letters were "*Brady*" and "3500" material, which should have been turned over to the defense at the time of trial. They had not been turned over. Nevertheless, the District Court denied the motion for a new trial and denied a hearing in support thereof, upon the ground that "the government's nondisclosure of these letters was inadvertent", stating that Campbell was "not involved in the trial or in its preparation," and that the actual government trial attorneys were "unaware of the existence of these letters which were in an administrative file in Washington, D.C. over which [the trial attorneys did not have] control or responsibility."

Upon this view of the facts, the District Court imposed upon the defense that standard which required a showing that the newly discovered evidence could have induced a reasonable doubt in the minds of the jurors. The District Court declined to apply that standard which merely required that the suppressed evidence be material or favorable to the defense.

In view of the government's concession that all of these letters were withheld and the hearing court's assumption that the letters were *Brady* and 3500 material, the following questions are presented:

1. Were the defendants entitled to an evidentiary hearing since the only contested issue was the extent of the government's culpability for the withholding of the materials, as required by *United States* v. *Hilton*, 521 F.2d 164 (2d Cir. 1975) and *United States* v. *Morell*, 524 F.2d 550 (2d Cir., 1975)?

a. Upon the known facts, did the District Court make a clearly erroneous finding when it held that Campbell was not involved in the trial or in its preparation?

b. Was the defense entitled to an evidentiary hearing with respect to the nature and extent of Campbell's involvement in the trial or in its preparation?

2. Did the trial court err in utilizing the knowledge of the government *trial* attorneys as the measure of the standard of responsibility which fell upon the government with respect to the disclosure to the defense of the letters in question? In any event, should not their disclosure compliance efforts have been the subject of a hearing?

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**Docket No. 75-1369**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

MILTON PARNESS and BARBARA PARNESS,

*Defendants-Appellants.*

## JOINT PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Milton Parness and Barbara Parness petition the Court for rehearing (F.R.A.P., Rule 40) and suggest rehearing *en banc* (F.R.A.P., Rule 35), upon the ground that the panel which considered this case either: (1) has, *sub silencio*, subverted prior holdings of this Court as illustrated by *United States* v. *Badalamente*, 507 F.2d 12 (2d Cir., 1974), *United States* v. *Hilton*, 521 F.2d 164 (2d Cir., 1975) and *United States* v. *Morell*, 524 F.2d 550 (2d Cir., 1975), or (2) materially misunderstood the factual and legal issues involved.

### Prior Proceedings

Following a jury trial in the Southern District of New York (Bonsal, D.J.), petitioners were found guilty upon two counts of causing interstate transportation of stolen property and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, each count being in violation of 18 U.S.C. § 2314. In addition, petitioner Milton Parness was found guilty of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(b). This Court affirmed the conviction, *United States* v. *Parness*, 503 F.2d 430 (1974), *cert. denied*, 419 U.S. 1105 (1975).*

* References followed by "—a" are to the appendices annexed to this petition.

Within less than ten days after the denial of certiorari, petitioners moved in the District Court for a new trial, pursuant to F.R.Cr.P., Rule 33, upon the grounds that, *inter alia*, the prosecution's key witness had perjured himself as to several matters and the prosecution had intentionally suppressed evidence favorable to the defense. During the pendency of the motion, additional evidence of suppression by the government was presented to the Court as additional proof of the aforementioned allegations. On September 29, 1975, in an opinion, the District Court denied the motion for a new trial (24a-32a). On January 7, 1976, in a memorandum order, this Court affirmed the determination of the District Court (33a-34a). On January 12, 1976, this Court denied petitioners' application to recall and stay the mandate pending the filing, hearing and determination of the instant petition for rehearing (35a-39a).

## Statement of the Case

### A. The Relevant Trial Facts

The basic facts of this case are set forth in this Court's opinion upon the direct appeal (1a, *et seq.*). We respectfully refer this Court to that opinion.*

In his opinion denying the motion for a new trial, Judge Bonsal characterized Alan Goberman as "the government's key witness at trial". (26a)

At trial, it was upon Goberman's testimony alone that the government rested its claim that Milton R. Parness owed the Hotel Corporation money which he was charged with converting and this was the *sine qua non* of the conviction.

### B. The Newly Discovered Evidence.

Prior to trial, Parness moved pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963) for disclosure of all ex-

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* An analysis of this Court's opinion upon the direct appeal reveals that this case probably demonstrates the application, to its outermost limits, of a broadly-worded criminal statute.

culpatory material (A. 26-27).** The District Court granted the motion, and the government agreed to comply with the requirements of *Brady* (A. 38). Parness also properly and timely requested all 3500 material. No dispute exists with respect to the defendants' demand and the government's obligation.

However, despite these requests and continuous demands throughout trial, twenty-four letters written by the government's chief witness, Goberman, to government attorneys in this case, and two letters written by such attorneys to Goberman, were never provided or otherwise disclosed to the defense. In March, 1975 they surfaced as a result of a lawsuit brought by Goberman against the United States (J. 413). Following the discovery of those letters, the government admitted to the existence of additional letters (J. 477).

As set forth at length at pp. 22-32 of Milton Parness' appellate brief in the instant appeal, and at pp. 7-13 of the appellants' Joint Reply Brief, the letters document Goberman's extremely strong financial motivation for testifying against the Parnesses, as well as his friendly and cooperative relationship with government counsel, his personal instability, and his possession of exculpatory information.

In denying the new trial motion, the District Court assumed, but did not hold "that the letters were 3500 or *Brady* material". In view of that assumption, no useful purpose would be served by a further exploration of the defendants' right to disclosure of the material in question. The right to such disclosure has not been seriously disputed and the District Court assumed it to have existed.

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** References beginning with "A." are to the Appendix which was filed with this Court upon the direct appeal. References beginning with "J." are to the Appendix which was filed with this Court upon the appeal fom the denial of the motion for a new trial. References preceded by "S." are to the Supplemental Appendix annexed to the appellants' Joint Reply Brief in this Court upon the appeal from the denial of the motion for a new trial.

## Reasons for Granting the Petition

### POINT I

**The District Court made a clearly erroneous finding when it held that prosecutor Campbell was not involved in the trial or in its preparation. In any event, the defense was entitled to an evidentiary hearing with respect to the extent of Campbell's relationship to this prosecution.**

In *United States* v. *Hilton*, 521 F.2d 164 (2d Cir., 1975), this Court analyzed the various legal standards to be applied in determining whether a new trial should be granted when the government does not comply with its disclosure obligations. This Court's analysis made clear that "If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense" and that ". . . it is the policy of the Court that it, and not the United States Attorney's Office will rule on the materiality of evidence which may be only marginally useful to the defense." (521 F.2d at 166).

In *Hilton*, the District Court had essentially reached the same conclusions as did Judge Bonsal in the present case, i.e., that the material was, in fact, Jencks Act material, but that the nondisclosure was "inadvertent" an dthat the nondisclosed material would not have induced a reasonable doubt in the minds of the jury. 521 F.2d at 167. The Court, nevertheless, remanded the case to the District Court for an additional hearing upon the ground that the original hearing had not sufficiently probled the deliberateness of the nondisclosure by the government. In doing so, this Court held:

> ". . . [T]he issue before us is more than reviewing the trial court's determination of whether a reasonable doubt would have been induced in the jurors. Before we can apply the reasonable doubt standard we must determine whether the trial court was correct in concluding that the sup-

> pression was inadvertent. Our interest in enforcing the prophylactic rule requiring that a new trial be granted in cases of deliberate nondisclosure dictates that the facts surrounding the disclosure be developed in an adversarial context as required by *Hilton*." See also: *United States* v. *Badalamente*, 507 F.2d 12 (2d Cir. 1974).

In the present case, no opportunity was given to the defense to develop the facts within an adversarial context as required by *Hilton*.

The first issue relating to the issue of deliberateness concerned the relationship of R. J. Campbell to the prosecution of this case. Mr. Campbell was the ultimate recipient of practically all of the letters in question. In denying the motion for a new trial, Judge Bonsal predicated his finding of inadvertence upon the additional finding that "The letters written by Goberman were each written to Department of Justice attorneys who were not involved in the trial or in its preparation." (31a), and that the actual trial attorneys (McGuire and Dowd) were "unaware of the existence of those letters which were in an administrative file in Washington, D.C., over which neither had control or responsibility." (32a).

Upon the existing record, Judge Bonsal's finding with respect to Campbell's relationship to this prosecution was clearly erroneous. In any event, the existing record facts certainly require that, at the very least, the defense should be accorded an evidentiary hearing consistent with the principles enunciated in *Hilton*, *supra*. Those record facts are as follows:

1. Between December 13, 1972 and August 23, 1973, twenty-four letters were sent by Goberman to various prosecutors in this case and two additional letters were sent to Goberman by agents of the government. Fifteen of Goberman's letters were sent to R. J. Campbell, the attorney in charge of Strike Force 18 in Washington, D.C., who was also designated a Special Assistant United

States Attorney in the Southern District of New York contemporaneously with the prosecution of this case.*

2. In an affidavit submitted with respect to the instant motion for a new trial, Mr. Campbell acknowledged that he "had occasion to supervise and participate in a criminal investigation of Milton Parness which ultimately led to Mr. Parness' indictment in the Southern District of New York . . ." (J. 454). The record shows that he conducted the majority of the grand jury proceedings in this case (A. 270-274), was present when the trial began (A. 306), and was with government trial counsel when Goberman was going over his testimony just prior to trial in the office of government trial counsel (A. 306), and was present in the courtroom for at least part of Goberman's testimony during the trial (J. 453).

3. Campbell remained in charge of Strike Force 18 throughout the entire trial, which began in early September, 1973. Throughout this period, one of the trial prosecutors, John M. Dowd, was his deputy.

4. Mr. Campbell is listed as one of the government attorneys in this case on the brief submitted by the government in response to motions to dismiss the indictment, for a bill of particulars, and for *Brady* material (S. 1, *et seq.*), and as one of the attorneys for the government in the very opinion of the District Court which required the government to provide the defense with all *Brady* material (S. 2, A. 28).

5. On May 1, 1973, some four months after Campbell purportedly turned this case over to the actual govern-

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* Upon the argument of this appeal, counsel for appellant Milton Parness advised this Court that he had learned that five additional letters, addressed to Special Assistant United States Attorney Michael Pollack of the Strike Force attached to the Eastern District of New York, had been forwarded by Pollack to Campbell. Thus, the total number of letters in Campbell's possession amounted to at least twenty. During the preparation of this petition for rehearing, Michael Pollack has provided counsel for the appellants with an affidavit substantiating this fact. The original of that affidavit will be filed with this Court together with the instant petition for rehearing. The affidavit is reproduced as Appendix E, hereto, at 40a-42a.

ment trial attorneys, Mr. Campbell stated in a sworn affidavit, filed in this case, as follows:

> "I am a Special Attorney, Organized Crime Section United States Department of Justice and a Special Assistant United States Attorney in this District. I have been assigned to supervise and conduct the criminal investigation of the acquisition and operation of the St. Maarten Isle Hotel and Casino by Milton Parness." (Affidavit of R. J. Campbell, dated May 1, 1973). *See also* S. 3.

We have, therefore, a clear demonstration of Mr. Campbell's intricate active, and continuing involvement in the prosecutions of this case through to the point of conviction. If the known, uncontradicted and undisputed facts do not demonstrate that Judge Bonsal's holding of non-involvement by Campbell is clearly erroneous, then, these same facts required that the defense be granted an evidentiary hearing with respect to the extent and nature of Campbell's continuing involvement. Such a hearing is mandated not only by *Hilton*, *supra*, but also by the Court's more recent opinion in *United States* v. *Morell*, 524 F.2d 550 (2d Cir., 1975). In that case, a government agent apparently had in his possession information which should have been turned over to the defense. This Court remanded for an evidentiary hearing so that it might be determined whether the failure to disclose the material was deliberate or the result of gross negligence on the part of the government. In doing so, this Court stated as follows:

> "* * * He [Agent McElroy] was the individual who supervised Valdez and in that capacity maintained the confidential file on him. While the prosecutor cannot be charged with the failure to produce information in the possession of any government official, in this case it seems fair to view McElroy as an arm of the prosecutor. [Citations omitted] He not only supervised Valdez and participated actively in this investigation, but also was present at counsel's table throughout all or most of the trial, indicating that he was intimately involved in the prosecution. McElroy may or may

> not have heard or been aware of the defense's request for information. That is a matter of fact for the District Court to explore on remand, and we should think that the testimony of McElroy would be highly important." (524 F.2d at 555)

In the present case, particularly in view of Mr. Campbell's appearance of record with respect to the defense pre-trial *Brady* motion, and in view of his superior status as an experienced prosecutor, there can be no doubt that he was on notice with respect to the disclosure obligation. Not even an affidavit has been submitted by Mr. Campbell explaining his failure to forward the material in question either to government trial counsel or directly to the defense. The record is silent as to his knowledge of understanding or advertence to the *Brady* obligation with respect to this or any other material. That black silence must have the light of an evidentiary hearing cast upon it.*

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* The opinion of the panel in this case denying a stay of the mandate characterized the issues presented as being "frivolous". Particularly in view of the facts set forth under the instant point, that characterization demonstrates a substantial conflict between the holding of this case and the holdings of *Hilton* and *Morell, supra.*

Since that same memorandum opinion of the panel indicates that the appellant Milton Parness engaged in dilatory tactics following his conviction herein, the following should be noted: Roy M. Cohn was appellant Milton Parness' trial attorney and continued to represent him through the motion for a new trial. Jay Goldberg has been appellant Milton Parness' attorney and continues to be such. Any protraction of proceedings in this case following the judgment of conviction cannot be attributed to any improper motivation on the part of appellant Milton Parness or his counsel. To the contrary, the protraction of proceedings was due to the government's delay in filing its responsive papers or due to the time necessary for the respective courts to hear and determine the issues presented. With reference to the issue presented upon the motion for a new trial, the panel makes much of the deference which ought be accorded to the opinion of the District Court. It is noteworthy that the District Court did not find the appellant Parness had been dilatory and found that there was sufficient merit to his claim to entitle him to bail pending appeal.

## POINT II

**The District Court made a clearly erroneous finding when it held that the Government should not be taxed with knowledge of the existence of the contents of the so-called "administrative file". In any event, the defense was entitled to an evidentiary hearing with respect to the procedures followed by the Government for the purpose of ascertaining and fulfilling its *Brady* and Jencks act obligations.**

The only information supplied by the government with respect to its pre-trial and trial efforts to ascertain and fulfill its Brady obligation, as relating to the Goberman letters, was contained in an affidavit of John M. Dowd, one of the trial prosecutors, who, at the time of trial, was a deputy to Mr. Campbell and who has since succeeded Mr. Campbell as attorney in charge of Strike Force 18 (J. 477).

Mr. Dowd recites in his affidavit, *inter alia*, as follows:

> 3. "In or about June or July 1973, the entire Parness investigative file was transported to the Southern District of New York for maintenance in the office of Assistant United States Attorney Harold F. McGuire, Jr., to be used in preparation of the trial of this case.* * *
>
> * * * * *
>
> 5. "I have recently searched the Parness investigation file and have not found any of the letters attached to the post-trial motions.
>
> * * * * *
>
> "8. Following the filing of the post-trial motions containing the Goberman correspondence, your affiiant searched all of the files of this Strike Force to determine if any of the correspondence in issue here was in the files.
>
> "9. In a search of the administrative files of this Strike Force which contain travel files, miscellaneous correspondence files, personnel files, chronological correspondence for the office and each attorney, I found the following letters from

> Goberman which are at issue in the post-trial motions: [here Mr. Dowd lists various Goberman letters].
>
> "10. Prior to the trial of Milton Parness in September and October 1973, your affiant was not aware of the correspondence contained in the administrative files of this Strike Force *and made no search of the administrative files prior to transporting the files to New York for the preparation and conduct of the trial.*" (J. 477-480) [Emphasis added]

The above noted information conveyed by Mr. Dowd's affidavit constitutes the government's sole excuse for the alleged "inadvertence" in this case. No reason is given by Mr. Dowd as to why he did not search the so-called "administrative" files. He makes no claim that within his experience *Brady* or 3500 material is not likely to be found in such files. He does not mention making any effort to inquire of Mr. Campbell as to whether Mr. Campbell was aware of any *Brady* or 3500 material. In short, everything in Mr. Dowd's affidavit is consistent with the defense claim that he kept himself in a state of vincible ignorance. A government attorney cannot be permitted to climb behind the barrier of "inadvertence" if he has grossly neglected his statutory, constitutional, and court ordered obligation to uncover and disclose to the defense material which is in the possession of the government. To characterize a file as an "administrative" file is to play games with words. The government cannot escape its obligation by placing its material in files of different colors and claiming that only one color was used to prepare for trial.

## CONCLUSION

**For all of the above reasons, rehearing or rehearing *en banc* ought be granted.**

Respectfully submitted,

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HENRY J. BOITEL
*Of Counsel.*

# APPENDIX

## APPENDIX A

**Opinion of Court of Appeals on Original Appeal (June 27, 1974)**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

MILTON PARNESS and BARBARA PARNESS,

*Appellants.*

[503 F.2d 430]

No. 984, Docket 74—1027

United States Court of Appeals,

Second Circuit.

Argued April 8, 1974.

Decided June 27, 1974.

On appeals from judgments of conviction after jury trial in the Southern District of New York, Dudley B. Bonsal, J., finding both appellants guilty on two counts of causing interstate transportation of stolen property and on one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, and finding one appellant guilty of acquiring an enterprise through a pattern of racketeering activity, the Court of Appeals, Timbers, Circuit Judge, held: (i) that evidence was sufficient to establish that cashier's checks transported interstate were proceeds of converted funds without tracing each particular conversion, and to establish that both defendants were involved in scheme; (ii) that any

error in connection with the acquisition conviction arising from alleged variance between the theory of the crime charged and the theory on which that count was submitted to the jury was harmless beyond a reasonable doubt; (iii) that statute proscribing acquisition of an enterprise through a pattern of racketeering activity applied to acquisition of foreign business where there was requisite impact on domestic commerce; and (iv) that statute was not unconstitutionally vague on its face or as applied.

Affirmed.

Roy M. Cohn, New York City (Eugene Gressman, Washington, D.C., and Michael Rosen, New York City, on the brief), for appellants.

Bart M. Schwartz, Asst. U.S. Atty, New York City (Paul J. Curran, U.S. Atty., and S. Andrew Schaffer, Asst. U.S. Atty., New York City, on the brief), for appellee.

Before FRIENDLY and TIMBERS, Circuit Judges.*

TIMBERS, Circuit Judge:

Appellants Milton and Barbara Parness [1] appeal from judgments of conviction entered upon jury verdicts returned on October 3, 1973 after a thirteen day trial in the Southern District of New York before Dudley B.

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* The parties agreed in open court that these appeals would be heard and decided by a panel of two judges.

[1] Unless otherwise stated, appellant Milton Parness will be referred to as Parness and appellant Barbara Parness will be referred to as Barbara or Barbara Landew her name before her marriage to Milton Parness. Appellants were married after the acts charged in the indictment.

Bonsal, District Judge, finding them guilty on two counts of causing interstate transportation of stolen property (Counts Four and Six) and on one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud (Count Five), in violation of 18 U.S.C. § 2314 (1970); and, in addition, finding Milton Parness guilty of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity (Count One), in violation of a provision of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. § 1962(b) (1970).[2]

Of the numerous claims of error raised on appeal, we find the following to be the principal ones: (1) both appellants challenge the sufficiency of the evidence; (2) Parness claims that there was a material variance between

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[2] The indictment returned August 2, 1973, which superseded an earlier one, contained seven counts. In Counts One, Two and Three, Parness was charged with acquiring three separate enterprises through patterns of racketeering activity, in violation of 18 U.S.C. § 1962(b) (1970). Counts Four through Seven charged both defendants, in violation of 18 U.S.C. § 2314 (1970), with crimes alleged to constitute the individual acts of racketeering which formed the pattern of racketeering charged in Counts One through Three.

The trial began on September 12 and concluded on October 3, 1973 when the jury returned a verdict finding both defendants guilty on Counts Four, Five and Six and Parness guilty on Count One. Counts Two, Three and Seven were dismissed at the close of the government's case.

On December 7, Parness was sentenced to concurrent ten year terms of imprisonment on each of the four counts and was fined a total of $55,000. He has been enlarged on bail pending appeal. Barbara was sentenced to concurrent two year terms of imprisonment on each of Counts Four, Five and Six and was fined a total of $6,000; execution of her sentences of imprisonment was suspended and she was placed on probation for three years.

the theory of the crime charged in Count One and the theory upon which that count was submitted to the jury; (3) Parness claims that the acquisition of a foreign corporation by means of criminal acts committed in the United States does not state an offense within the meaning of § 1962(b); and (4) Parness claims that the statute is unconstitutionally vague on its face and as applied. Questions (3) and (4) appear to be ones of first impression. Other subordinate claims of error are also raised.

We affirm.

## I.

In view of the issues raised on appeal, including the challenge to the sufficiency of the evidence, the following summary of the events from the end of 1967 to the middle of 1971 which culminated in the indictment is believed necessary to an understanding of our rulings on those issues.

In 1967, Allan Goberman, a successful Pennsylvania businessman, learned of an opportunity to invest in the St. Maarten Isle Hotel Corporation, N.V. (Hotel Corp.) which owned an insolvent and partially completed hotel-casino complex on the island of St. Maarten in the Netherlands Antilles. He organized the Goberman Construction Company, N.V. and arranged for the necessary financing through American sources and later from the Antillean government with which to complete the construction of the hotel-casino in January 1970. When the complex was opened in early 1970, Goberman owned 90.5% of Hotel Corp.'s stock. He also held a $3.5 million demand note from Hotel Corp. which represented money he had loaned Hotel Corp. for construction of the complex.

*Appendix A—Opinion of Court of Appeals on Original Appeal (June 27, 1974)*

The hotel was moderately successful during its first few months of operation. As the winter holiday season came to an end in early 1970, however, it became apparent that the hotel's continued financial success depended upon additional income from gambling junkets to the casino. These junkets, originating primarily in the United States, were organized by junket operators (junketeers) who arranged for a group of prospective gamblers to be flown to St. Maarten and to be provided with accommodations at the hotel, all free of charge.

Each junket participant prior to his departure from the United States was required to deposit gambling "front money" with the junketeer. If his losses at the casino exceeded his initial stake, he was permitted to gamble on credit. These credit advances were evidenced by signed IOU's, commonly known as markers. When a player was unable to recoup his losses and thereby redeem his markers prior to his return to the United States, it was the responsibility of the junketeer to collect such debts and to remit the proceeds, less a commission, to Hotel Corp. The junketeer also was responsible for forwarding the front money to Hotel Corp.

In mid-1970, Goberman first met Parness, a junketeer who had been arranging successful junkets to the casino for some time through his corporation, Olympic Sports Club, Inc. In the fall of 1970, Goberman offered Parness the exclusive right to manage and direct junkets to the hotel-casino. Parness accepted. Thereafter all such junkets were arranged through Parness and Olympic. Beginning in late 1970 and continuing until his eventual acquisition of Goberman's interest in Hotel Corp., Parness assumed sole responsibility for collecting all of the hotel's

outstanding marker receivables. During the same period, Olympic's sole function was arranging gambling junkets to the hotel. Almost its only income was from gamblers' front money and marker collections.

Despite the income from the gambling junkets, Hotel Corp. began to experience serious financial difficulties within a few months of the opening of the hotel-casino. In order to continue operations until permanent financing could be arranged, Goberman on October 6, 1970 obtained from Leonard Holzer of New York City a short term $150,000 loan (the Holzer loan). Goberman signed a promissory note in this amount, secured by a pledge of his entire 226,500 share interest in Hotel Corp. Goberman advanced virtually the entire $150,000 to Hotel Corp. Parness knew of the Holzer loan and of the hotel's financial straits.

In late 1970, Holzer began to threaten Goberman with foreclosure on the stock pledge unless the loan was immediately repaid. In order to obtain the necessary funds with which to repay the loan, Goberman repeatedly asked Parness for approximately $400,000 in overdue marker receivables which Parness claimed he had not yet been able to collect. Because these funds were not forthcoming from Parness or Hotel Corp., Goberman was unable to repay the loan. Holzer called the loan and on January 25, 1971 began foreclosure proceedings on Goberman's stock interest in Hotel Corp.

Shortly before Goberman's Hotel Corp. stock was to be sold at auction on February 4, 1971, Parness told Goberman that, although the outstanding markers were still uncollectible, he had arranged to borrow $150,000 and would advance that sum to Goberman to enable him to

repay the Holzer loan. Parness told Goberman that the lenders had demanded that Goberman again pledge his entire interest in Hotel Corp. At Parness' direction, Goberman signed a loan agreement with two Parness nominees, Barbara Landew (Parness) and one Stanley Amsterdam, pursuant to which he was to receive $160,000 [3] (the Goberman loan). Neither Barbara nor Amsterdam had supplied any of the funds loaned to Goberman. Amsterdam signed the agreement only as a favor to Parness.

On February 4, Barbara went to a bank in West Orange, New Jersey, and with $99,000 in cash and a $56,000 check drawn on Olympic's account, purchased two cashier's checks.[4] These were to be used by Goberman to repay the Holzer loan. Later the same day, Parness arranged for Goberman, his attorney and Holzer's attorney to meet in Manhattan. From there they went to the New Jersey bank and picked up the cashier's checks which Barbara had left there. On February 9, again using Olympic funds, Barbara purchased another $5,000 cashier's check at the same bank and forwarded it to Holzer's counsel in New York as legal fees.[5]

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[3] The $160,000 represented the $150,000 principal of the Holzer loan, plus $5,000 in accrued interest and $5,000 for Holzer's attorney's fees.

[4] The cashier's checks were in the amounts of $150,000 and $5,000, representing the principal and accrued interest on the Holzer loan.

[5] The interstate transportation of the two cashier's checks on February 4, Goberman's interstate travel on the same day, and the February 9 interstate transportation of the additional $5,000 cashier's check constitute the violations of § 2314 charged in Counts Four, Five and Six, respectively. They also constitute the pattern of racketeering activity, in violation of § 1962(b), charged in Count One.

*Appendix A—Opinion of Court of Appeals on Original Appeal (June 27, 1974)*

During February and March of 1971, Goberman continued his efforts to obtain from Parness the $400,000 in unremitted marker receivables. Because this money was still not forthcoming and allegedly because Goberman was denied access to other funds which Parness had remitted to Hotel Corp., he was unable to repay Barbara and Amsterdam. They, at Parness' direction, prepared to exercise their rights under Goberman's latest pledge of his Hotel Corp. stock. On April 3, Parness' counsel drafted, and Goberman, Barbara and Amsterdam executed, a number of documents bearing various dates and purportedly prepared over a period of time in the ordinary course of business, the end result of which was that Goberman was formally divested of his 226,500 shares of Hotel Corp. stock.

Shortly thereafter, Parness acquired Aliter Holdings, N.V., a shell Antillean corporation. He did so through his cousin, Edward Levrey. On June 10, Barbara and Amsterdam transferred "their" interest in Hotel Corp. to Aliter. In a letter purportedly written by Levrey, Aliter acknowledged receipt of the stock. The letter also sought to establish that Aliter had provided the funds for the Goberman loan and that Barbara and Amsterdam had acted as its agents throughout. Aliter in fact had supplied no funds to Barbara or Amsterdam and had not even been an active corporation at the time the Goberman loan was made.

During the summer of 1971, Parness, again using Levrey as a front, acquired Terrasol Holdings, N.V., another shell Antillean corporation. Terrasol then exchanged its common stock for Aliter's holdings in Hotel Corp. In November, Parness attempted to make a public offering of Terrasol common stock in Canada. The prospectus, pre-

pared at Parness' direction, falsely described Terrasol as a Levrey family corporation and falsely represented that Levrey had purchased the 226,500 shares of Hotel Corp. stock from Goberman for $150,000 in cash. Levrey in fact had invested no funds in either Aliter or Terrasol and had had no financial dealings with Goberman.

## II.

In challenging the sufficiency of the evidence, appellants claim that the government failed to establish that the cashier's checks, which they caused to be transported in interstate commerce, represented converted marker proceeds. They contend therefore that the evidence was insufficient to support their convictions of the crimes charged under § 2314 (Counts Four and Six)[6] and that it was likewise insufficient to support a finding of two indictable acts on which to predicate Parness' conviction under § 1962(b) (Count One). Barbara also claims that, even if the funds were unlawfully withheld, there was no evidence that she knew of it and therefore no basis for her conviction as an aider and abettor. Viewing the evidence in the light most favorable to the government, United States v. McCarthy, 473 F.2d 300, 302 (2 Cir. 1972), we hold that each of these claims is without merit.

True, the government did not trace the proceeds of particular marker collections from specific gambler-debtors through Parness and Olympic to Goberman in the

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[6] Proof of conversion of marker collections was not required for conviction on Count Five which charged appellants under paragraph 2 of § 2314 with causing Goberman to travel interstate on February 4 in furtherance of the scheme to defraud him of his interest in Hotel Corp.

form of a loan. Given the nature of the enterprise involved, the absence of such evidence is not surprising,[7] nor is it fatal to the government's case. There was evidence that Parness was in a position to have collected and to have withheld substantial amounts of marker receipts. There also was evidence of numerous and flagrant efforts by Parness and Barbara to conceal both the source of the funds and the interest of Parness in the various transactions. From this and other evidence the jury was warranted in finding the requisite nexus between the money due Hotel Corp. and the Goberman loan. In short, there was ample circumstantial evidence from which the jury reasonably could find the requisite theft or conversion.

The record establishes that Hotel Corp. failed to receive approximately $400,000 in overdue marker accounts payable during a period when Parness was solely responsible for and had exclusive control over marker collections. Parness thus had access to vast sums of money due Hotel Corp. and a clear opportunity to have concealed collections and to have withheld the proceeds.

The record further shows that Olympic derived its income almost exclusively from junket front money and marker collections. From this the jury was entitled to infer that the two Olympic checks totalling $61,000, which Barbara used on February 4 and 9 to purchase the cashier's checks, represented the proceeds of unremitted marker collections.

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[7] Markers often were paid in cash by carriers for the gambler-debtors. In late January 1971, agents of the Internal Revenue Service intercepted such a carrier and seized $60,000 in cash marker collections intended for Parness.

*Appendix A—Opinion of Court of Appeals on Original Appeal (June 27, 1974)*

The efforts of Parness and Barbara to conceal the use of Olympic funds in connection with the Goberman loan tend to buttress this inference. The two Olympic checks initially were reflected on the corporation's disbursements ledger as air fare payments to a travel agency with which Barbara was associated. Actually no such payments were ever made. Parness later described these sums as "re-deposits" of Olympic funds. Not until the summer of 1972, after the government had begun its investigation into the takeover of Hotel Corp., did Parness acknowledge to his accountant that the money had been loaned to Goberman. In a further attempt to conceal Olympic's role in the acquisition of Hotel Corp., Barbara testified falsely before the grand jury investigating the takeover that it was Levrey who had provided $150,000 *in cash* to be used for the Goberman loan. Plainly she knew that Olympic checks were used and that Levrey had not supplied the funds. From these and other attempts to cover up Olympic's participation, the jury was warranted in finding that Parness and Barbara concocted a scheme to avoid the suspicions which would have stemmed from knowledge that the funds for the Goberman loan had come from a corporation which derived its income from casino receipts and which had failed to remit substantial sums due Hotel Corp.

There also was ample evidence to support the inference that the $99,000 in cash used on February 4 to enable Goberman to repay the Holzer loan represented money due Hotel Corp. The Holzer loan was repaid at a time Parness was making substantial marker collections. Shortly before the Goberman loan, as noted above, agents of the Internal Revenue Service seized $60,000 in cash marker collections intended for Parness. The jury reasonably could have found that this seizure precipitated the

cover-up of Olympic's participation. But for such an unexpected occurrence, Parness would have had sufficient cash with which to have consummated the Goberman transaction undetected. Had such cash been available, Parness need not have resorted to the more easily traceable Olympic checks, and the coverup would have been unnecessary.

But the deception went further. In addition to the efforts to conceal Olympic's role in Parness' scheme to acquire Hotel Corp., there was evidence that Parness resorted to similar schemes to disguise his own personal involvement in the Goberman loan and the subsequent clandestine corporate transactions.[8] He used nominees in the loan agreement itself. He used a straw man in connection with his acquisition of Aliter and Terrasol. And he had documents prepared which falsely represented that first Aliter and then Levrey had provided the funds used to acquire Hotel Corp.

The government adduced overwhelming evidence which disproved each of these false representations, as well as evidence which exposed the implausibility of explanations offered by Parness for other false representations. The jury surely was justified in concluding that all were part of Parness' scheme to cover up his conversion of money due Hotel Corp. In short, in the context of this record and in view of the complete absence of any credible

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[8] Parness also sought to conceal his interest in Olympic itself. He executed corporate documents in the name of Edward Feldman without the latter's knowledge. Later he tried to persuade Feldman to testify falsely at trial that he had authorized Parness to use his name.

explanation [9] as to the source of funds used in connection with the Goberman loan, we fail to see how the jury could have reached any conclusion except that Parness had withheld marker collections and had used the proceeds of such collections and the front money to acquire Goberman's interest in Hotel Corp.[10] As we recently stated in United States v. Frank, 494 F.2d 145, 153 (2 Cir. 1974):

> "[T]he defendants were not required to testify or to present any case at all, and the jury could not permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, . . . to the level of a convincing refutation. When a defendant has offered no [credible explanation], it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version . . . ."

Cf. United States v. Sheiner, 410 F.2d 337, 340 (2 Cir.), cert. denied, 396 U.S. 825 (1969).

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[9] Neither appellant testified at trial. The only witnesses called by the defense were John Blandino, the executive assistant manager at the hotel in 1970, and Larry Falgin, Esq., the attorney who represented Holzer in the Goberman transaction.

[10] Relying on Griffin v. California, 380 U.S. 609 (1965), appellants argue that the prosecutor's reference in his summation to the lack of any credible explanation as to the source of the funds constituted an impermissible comment on their failure to produce evidence or to testify on their own behalf. Read in context, we hold that the prosecutor's remarks constituted fair comment on the weakness inherent in the entire defense case and not improper comment upon appellants' silence. See United States v. Dioguardi, 492 F.2d 70, 82 (2 Cir. 1974); United States v. Lipton, 467 F.2d 1161, 1168 (2 Cir. 1972), cert. denied, 410 U.S. 927 (1973).

We also reject Barbara's claim that the evidence was insufficient to support her conviction as an aider and abettor. Her active involvement in virtually every aspect of Parness' scheme to acquire Hotel Corp. and the subsequent cover-up warranted the jury in finding that she had associated herself with the venture and had sought to make it succeed. Nye & Nissen Corp. v. United States, 336 U.S. 613, 619 (1949), quoting in part from United States v. Peoni, 100 F.2d 401, 402 (2 Cir. 1938) (L. Hand, J.); United States v. Manna, 353 F.2d 191, 192 (2 Cir. 1965), cert. denied, 384 U.S. 975 (1966).

It is not an overstatement to characterize the evidence of Barbara's participation as overwhelming. She purchased the cashier's checks used in connection with the Goberman loan. She stated to the person who accompanied her to the bank on February 4 that she was arranging for the takeover of a hotel. She allowed her name to be used in the loan agreement. She participated in executing on April 3 the bogus documents by which Goberman was formally divested of his stock. She acquiesced in the transfer without consideration of "her" interest in Hotel Corp. to Aliter.

Moreover, she testified falsely before the grand jury that Levrey had furnished $150,000 in cash to be used for the Goberman loan. It is axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force. United States v. Lacey, 459 F.2d 86, 89 (2 Cir.), cert. denied, 409 U.S. 860 (1972); United States v. DeAlesandro, 361 F.2d 694, 697-98 (2 Cir.), cert. denied, 385 U.S. 842 (1966). This rule has especially compelling application here, for Barbara's false testimony tended not only to conceal her own participation in the transfer of the stolen funds but furthered the cover-up initiated by her husband.

## III.

Parness claims that his conviction under § 1962 (b) must be reversed because there was a material variance between the theory of the crime charged in Count One and the theory upon which that count was submitted to the jury. We hold that, if there was error at all in this respect, it was harmless beyond a reasonable doubt.

Count One charged Parness under § 1962(b), among other offenses, with acquiring Goberman's interest in Hotel Corp. through a pattern of racketeering activity involving the conversion and interstate transportation of marker proceeds. The evidence established that Parness gained control of Hotel Corp. by (1) withholding funds due Hotel Corp., (2) loaning a portion of these funds to Goberan, and (3) thereafter preventing him from repaying the loan by continuing to conceal marker collections and by denying him access to other funds which Parness had remitted. Parness claims that this latter "remittal-deprivation" scheme was not charged in the indictment. He argues that the district court, in instructing the jury to consider it, in effect sanctioned an amendment of the indictment and permitted the jury to convict him of a crime not charged.

In our view, even if the jury did consider the so-called "remittal-deprivation" evidence and assuming such evidence was not precisely within the literal scope of the allegations of the indictment, that could have had no effect whatever on his conviction under § 1962(b). Parness was charged with and convicted of three separate violations of § 2314. Counts Four and Six charged interstate transportation of cashier's checks on February 4 and 9. Count Five related to Goberman's interstate travel on

February 4. Convictions on any two of these counts were sufficient under § 1961(5) to establish the "pattern of racketeering activity" necessary for a conviction under § 1962(b). In order to find Parness guilty on Counts Four and Six, the jury was required to find only that he converted marker collections and caused the proceeds to be transported in interstate commerce. Whether Goberman at some later date may or may not have been denied access to remitted funds has no bearing on such a finding. Parness' convictions on Counts Four and Six were unaffected by the jury's alleged consideration of the "remittal-deprivation" evidence. Such convictions provide sufficient predicates for his conviction under § 1962(b).

## IV.

Parness claims that, in enacting Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 et seq. (1970), of which § 1962(b) is a part, Congress did not intend to proscribe the acquisition of foreign businesses by means of criminal conduct committed in the United States despite the impact on domestic commerce. Specifically, he argues that his take-over of Hotel Corp., an Antillean corporation, cannot be said to constitute an offense under § 1962(b) because Hotel Corp. is not an "enterprise" within the meaning of the Act. This argument is predicated upon an unreasonably narrow interpretation of the statute and is refuted by the language and legislative history of § 1962(b).

Section 1962(b) proscribes the acquisition of "any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or

foreign commerce." [11] "Enterprise" is defined in § 1961 (4) to include "any . . . corporation". On its face the proscription is all inclusive. It permits no inference that the Act was intended to have a parochial application. The legislative history, moreover, strongly indicates the intent of Congress that this provision be broadly construed. For example, the House Report on § 1962 states that:

> "*any acquisition* meeting the test of subsection (b) is prohibited *without exception.*" (emphasis added) [12]

We find Parness' claim unpersuasive for yet another reason. It presupposes that in enacting § 1962(b) Congress intended to focus exclusively upon the enterprise acquired and sought to protect only American institutions. There is no indication that the statute was meant to have such a limited remedial scope. On the contrary, its legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.

In its Statement of Findings and Purpose, by way of preface to Title IX, Congress made clear its concern for

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[11] We reject out of hand the claim that the activities of Hotel Corp. did not have the requisite effect on interstate or foreign commerce. It was owned by Goberman, an American citizen. It was financed by Pennsylvania banks and Massachusetts businessmen. It had numerous domestic creditors. It served primarily American tourists. And its accounts were payable in U.S. dollars to Olympic, a New Jersey corporation.

[12] H.R. No. 1549, 91st Cong., 1st Sess. (1970), quoted in 2 U.S. Code Cong. & Admin. News 4033 (1970).

Indeed, Congress clearly intended that Title IX as a whole "be liberally construed to effectuate its remedial purposes." Pub. L.No. 91—452 § 904 (1970).

American investors and businessmen, as well as American institutions:

> "(1) organized crime in the United States . . . annually drains billions of dollars from America's economy by unlawful conduct . . . ;
>
> (4) organized crime activities . . . weaken the stability of the Nation's economic system, harm innocent investors . . . and undermine the general welfare of the Nation and [American] citizens; . . ." [13]

Moreover, the provisions of §§ 1963 and 1964 for broad civil remedies to victims of such infiltration further indicate the intent of Congress to protect the individual, as well as the "enterprise".

In short, we find no indication that Congress intended to limit Title IX to infiltration of domestic enterprises. On the contrary, the salutary purposes of the Act would be frustrated by such construction. It would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise. We reject any such construction.

Parness nevertheless advances an argument based on cases arising under the Labor Management Relations Act, 29 U.S.C. § 141 et seq. (1970). They deal with labor

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[13] Pub.L.No.91—452 § 1 (1970).

The floor debate on the Act further indicates the concern of Congress in protecting the American economy as a whole. E. g., 115 Cong.Rec. 5874 (1969) (remarks of Senator McClellan); 116 Cong.Rec. 35193 (1970) (remarks of Congressman Poff); 116 Cong.Rec. 35327 (1970) (remarks of Congressman Randall).

disputes involving alien staffs aboard foreign flag vessels operating in United States territorial waters. E. g., Windward Shipping (London) Ltd. v. American Radio Assn., 415 U.S. 104 (1974); McColloch v. Sociedad Nacional, 372 U.S. 10 (1963). Parness argues that we cannot apply § 1962(b) to his acquisition of Hotel Corp. unless "the affirmative intention of Congress [is] clearly expressed." Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957). His reliance on this line of cases is misplaced.

First, the rather obvious proposition for which these cases stand is simply that a court should consider the legislative history of a statute to determine its applicability to a given factual situation. International Longshoreman's Local 1416 v. Amdriadne Shipping Co., 397 U.S. 195, 198-200 (1970). Having done so here, we have concluded that Congress intended to make criminal the acquisition of any "enterprise" having the requisite nexus with interstate or foreign commerce if done in the manner proscribed by the statute.

Secondly, the *Benz-McColloch-Windward* line of cases involved the exercise of American sovereignty—here, in the context of American labor law—in a regulatory area in which international comity is traditional. Windward Shipping (London) Ltd. v. American Radio Assn., *supra*, 415 U.S. at 112-13; McColloch v. Sociedad Nacional, *supra*, 372 U.S. at 21. These cases presented difficult issues in the "delicate field of international relations". Benz v. Compania Naviera Hidalgo, *supra*, 353 U.S. at 147. In view of this potential for international discord and retaliation, the Supreme Court was reluctant to apply regulatory provisions of the LMRA to foreign flag vessels and alien seamen in the absence of a clear Congressional directive.

Title IX, by way of contrast, in no way involves regulation of the internal affairs of enterprises subject

to the sovereign power of foreign states. The application of § 1962(b) here cannot conceivably endanger American foreign relations. The statute simply provides federal law enforcement agencies with the tools with which to combat organized crime in the United States.

Finally, we are not breaking new ground in applying federal criminal sanctions to activities involving both American and foreign contacts, as Parness suggests. The Sherman Act, 15 U.S.C. § 1 et seq. (1970), has been held to proscribe conspiracies in restraint of trade which are entered into in the United States but carried out both here and abroad, assuming the requisite effect on commerce. E. g., United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927); cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704-06 (1962). And, in dealing with one of the antifraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), we have held that, where there is substantial United States activity and Americans are hurt, it is immaterial that the corporation is foreign. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2 Cir. 1972).[14]

## V.

Finally, relying on Papachistou v. City of Jacksonville, 405 U.S. 156, 162 (1972), and United States v. Petrillo, 332 U.S. 1, 8 (1947), Parness claims that § 1962 (b) is unconstitutionally vague on its face and as applied.

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[14] We note that § 2314, violations of which provide the predicates for Parness' conviction under § 1962(b), has been held to apply to the transportation of foreign securities stolen in a foreign country. United States v. Greco, 298 F.2d 247, 251 (2 Cir.), cert. denied, 369 U.S. 820 (1962).

He asserts that the statute failed to convey to him a sufficiently definite warning as to the proscribed conduct.

Section 1962(b) provides in relevant part as follows:

> "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire . . . any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

"Racketeering activity" as charged in the instant indictment is defined in § 1961(1)(B) as "any act which is indictable under any of the following provisions of title 18, United States Code: . . . [section] 2314 (relating to interstate transportation of stolen property) . . . ." Under § 1961(5), a "pattern of racketeering activity" requires at least two such acts. Thus, as applied here, § 1962(b) proscribes the acquisition of any interest in any enterprise affecting interstate or foreign commerce resulting from at least two acts which are indictable under § 2314.

Despite what strikes us as the clarity of this statutory proscription, Parness claims that Congress committed a fatal error in defining "racketeering activity" in terms of an "act which is indictable under", rather than one which violates, the incorporated criminal statutes. He argues that, since he could not have known at the time he made his "investment" whether he would be indicted for the predicate § 2314 offenses, the statutory warning that his acquisition of Hotel Corp. would violate § 1962(b) was constitutionally inadequate.

Parness' argument presupposes that indictment under § 2314 is a condition precedent to a § 1962(b) prosecution. There is no such statutory requirement. A § 1962(b) offense is predicated in turn upon certain other

specified criminal offenses, the constitutionality of which is not challenged. Section 1962(b) creates a separate and wholly independent crime. As with other federal criminal statutes, violation of which is dependent upon proof of another crime, e. g., the Travel Act, 18 U.S.C. § 1952 (1970), and the Gun Control Act, 18 U.S.C. § 921 et seq. (1970), prosecution under § 1962(b) does not require that the predicate offenses must previously have been charged. Cf. United States v. Nardello, 393 U.S. 286, 293-96 (1969) (Travel Act); United States v. Ramirez, 482 F.2d 807, 813-14 (2 Cir.), cert. denied, 414 U.S. 1070 (1973) (Gun Control Act); United States v. Sudduth, 457 F.2d 1198, 1201 (10 Cir. 1972) (Gun Control Act); United States v. Rizzo, 418 F.2d 71, 74 (7 Cir. 1969), cert. denied, 397 U.S. 967 (1970) (Travel Act).

To convict Parness under § 1962(b), the prosecution was required to establish only that he acquired his interest in Hotel Corp. through two or more § 2314 violations. That he may have been uncertain as to whether he would be indicted for the predicate offenses is irrelevant to the adequacy of the warning of the risk of criminality conveyed by § 1962(b).

Parness claims that the phrase "pattern of racketeering activity", although clearly defined as "at least two acts of racketeering activity", is unconstitutionally vague as applied. He argues that, since he was charged under § 1962(b) with devising a scheme to acquire Goberman's interest in Hotel Corp. through a "pattern" of § 2314 offenses and since § 2314 proscribes interstate transportation in furtherance of a scheme to defraud, he could not have known whether two indictable § 2314 offenses referred to two fraudulent schemes or two acts of interstate transportation pursuant to a single scheme. This claim rests upon a misinterpretation of § 2314.

*Appendix A—Opinion of Court of Appeals on Original Appeal (June 27, 1974)*

The indictment charged Parness with three acts, each of which constituted a separate § 2314 offense. The interstate transportation of the cashier's checks on February 4 and 9 constituted two such acts (Counts Four and Six), and Goberman's interstate travel on February 4 a third (Count Five). Proof that the criminal conduct was in furtherance of a scheme to defraud was an essential element of the offense charged in Count Five only. To establish the offenses charged in Counts Four and Six, the government was required to establish only that Parness knowingly caused converted marker collections to be transported in interstate commerce. It did so. Accordingly, assuming arguendo that the claimed ambiguity under other circumstances might be said to exist, there is no such possibility here. The constitutional validity of a statute does not depend upon whether there are marginal cases in which its clarity may be in doubt. United States v. Petrillo, *supra*, 332 U.S. at 7; Robinson v. United States, 324 U.S. 282, 285-86 (1945); United States v. Manfredi, 488 F.2d 588, 603 (2 Cir. 1973), cert. denied, 417 U.S. 936 (1974). Rather, the test is whether the statute conveys an adequate warning as applied in a specific situation. E. g., Williams v. United States, 341 U.S. 97, 104 (1951); United States v. Deutsch, 451 F.2d 98, 113-14 (2 Cir. 1971), cert. denied, 404 U.S. 1019 (1972). Here, the interstate transportation of the two cashier's checks clearly were acts indictable under § 2314. They provided unambiguous predicates for the § 1962(b) "pattern".

We reject Parness' claim that § 1962(b) is unconstitutionally vague on its face and as applied.

We have considered appellants' other claims of error and find them to be without merit.

Affirmed.

## APPENDIX B

**Opinion of District Court on Motion for New Trial (September 29, 1975)**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 750

UNITED STATES OF AMERICA,

—v.—

MILTON PARNESS and BARBARA PARNESS,
*Defendants.*

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*Appendix B—Opinion of District Court on Motion for New Trial (September 29, 1975)*

**Memorandum**

BONSAL, *D. J.*

Defendants Milton and Barbara Parness move pursuant to Fed.R.Cr.P. 33 for a new trial based on newly discovered evidence on the ground that "the testimony of the prosecution's witness-in-chief was false as to material matters" and "that at the time of trial the United States Attorney knew or should have known of material evidence favorable to the defendants which was not disclosed or made available to the defendants." [1] Argument was had before the Court on August 27, 1975, limited to the issue of whether a hearing was necessary on defendant's motion.

Defendant Milton Parness was convicted on October 3, 1973, by a jury, of acquiring control of the St. Maarten Isle Hotel Corporation ("Casino-Hotel") in St. Maarten, Netherlands Antilles through a pattern of racketeering in violation of 18 U.S.C. §§ 1961, 1962(b) and 1963 (Count 1), of two counts of causing interstate transportation of stolen property, 18 U.S.C. § 2314 (Counts 4 and 5), and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, 18 U.S.C. § 2314 (Count 6). Milton Parness' wife, Barbara Parness, a co-defendant at this trial, was convicted on Counts 4, 5 and 6. Defendants each were sentenced on December 7, 1973. On June 27, 1974, the Second Circuit affirmed their convictions (503 F.2d 430 (2d Cir. 1974)), and on January 13, 1975 the Supreme Court denied certiorari (419 U.S. 1105 (1975)). Thereafter, Defendants made the instant motion for a new trial.

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[1] Defendants also appear to move for a new trial "in the interest of justice" on the ground "that there exists evidence of material facts not heretofore presented . . . which require vacation of the judgment." This motion is denied as untimely. See Fed. R.Cr.P. 33; *United States* v. *Smith*, 331 U.S. 469, 474-75 (1947).

*Appendix B—Opinion of District Court on Motion for New Trial (September 29, 1975)*

## I.

In order to grant a new trial based on newly discovered evidence, a defendant must show

> "*inter alia*, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict." *United States* v. *Sluteky*, 514 F.2d 1222, 1225 (2d Cir. 1975) (citations omitted).

The burden of proof is a stringent one since motions for a new trial based on newly discovered evidence "are not held in great favor." *Id; United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). *See United States* v. *Franzese*, 321 F. Supp. 993 (E.D.N.Y. 1970), *aff'd.* 438 F.2d 536 (2d Cir.), *cert. denied*, 402 U.S. 995 (1971).

Defendants initially allege that Allan Goberman (the Government's key witness at trial) in connection with the civil action filed by him against Defendants in the United States District Court for the District of New Jersey on February 3, 1974 (four months after trial), gave testimony in a deposition which differed from that given at Defendants' trial, and that this constituted newly discovered evidence.

A. Defendants first contend that in the deposition Goberman substantially modified the testimony he gave at trial as to the amount owed to him by the Casino-Hotel or Milton Parness. At trial Goberman testified that he believed he was owed approximately $400,000 in gross

marker "pick ups" as of February, 1971, and stated that he relied largely upon work sheets from the Casino-Hotel showing "win-loss totals and marker pick ups" during the period from October, 1970 through January, 1971. These work sheets were received in evidence as Government's Exhibits 167 through 177. Defendants' counsel cross-examined Goberman at length with respect to his estimates and used the exhibits in his summation. Defendants' present calculations and conclusions are based solely on the same exhibits and do not constitute newly discovered evidence.

B. Defendants contend that Goberman's testimony at trial about the money owed him by Milton Parness in unremitted marker pick ups was false in that Goberman did not state that Parness was entitled to deduct certain commissions from the gross marker pick ups that Parness was to collect. This contention does not entitle Defendants to a new trial because of newly discovered evidence. *See United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975). Defendants were the recipients of these commissions and Milton Parness demonstrated his knowledge of them when he testified at a hearing before this Court. In addition, Goberman referred to these commissions in his direct testimony at trial.

C. Defendants contend that the existence of checks constituting remittances from Milton Parness' corporation, Olympic Sports Club, Inc., to the Casino-Hotel during December, 1970 and January, 1971 which should have been credited to the amount owed to Goberman was not revealed to Defendants by the Government during or prior to trial. The trial record shows that these checks were reflected in the evidence at trial, specifically in Government's Exhibit 155, which Defendants' counsel used for

cross-examination and in summation. Moreover, the checks were written on the account of Olympic Sports Club, Inc., the corporation controlled by Milton Parness, who knew or should have known of their existence at trial. *See United States* v. *Slutsky, supra.*

Accordingly, none of the foregoing items constitute newly discovered evidence.

Additional claims of newly discovered evidence have been raised by defendants since they filed their motion, which evidence they assert was known to the Government but not disclosed to defendants at trial. Defendants contend that the Government failed to disclose to them that it had promised Goberman that it would recover for him the Casino-Motel and that the existence of this promise is supported by statements made by Goberman on February 24, 1975 during oral argument on his motion for summary judgment in the *pro se* action he filed against defendants in February, 1974, four months after the trial, in the District Court of New Jersey. Specifically, Defendants rely on Goberman's statement to the Court in New Jersey:

> "The reason why your Honor, I brought my claim under Section 1964D, and I may be, as you explained it, wrong is the fact that the United States government was supposed to have sued for the recovery under that act and to have recovered the hotel and returned it to me, and I'm trying to put myself in their position." Transcript, Feb. 24, 1975, at 17-18.

The Government contends that this statement is ambiguous and, in any event, contends that no promise of this nature was made.

*Appendix B—Opinion of District Court on Motion for New Trial (September 29, 1975)*

Defendants also contend that letters and other documents ("letters") written by Goberman between December, 1972 and January, 1974 to certain prosecutors who had investigated the case against Defendants [2] constituted either 3500 or *Brady* material. Defendants state that they discovered these letters in a file in an action filed in mid-1973 (apparently at approximately the time of Defendants' trial) by Goberman against the United States, 73 Civ. 2669, in the District Court for the Eastern District of Pennsylvania, seeking recovery of $60,815 taken by the Internal Revenue Service from one Sam Norber, which money Goberman contends Norber owed him as marker receipts. Defendants first contend that these letters establish that the Government promised to obtain for Goberman the $60,815 taken from Norber. Defendants also rely on statements in the letters such as: a reference in a letter dated December 13, 1972 to the government's intention "to persue [sic] the Fish-Weinberg matter . . ." and to recover monies from those persons which were allegedly obtained by fraud; a letter dated August 23, 1973 addressed to "Dear Mike" and signed "Allan"; a statement in a letter dated January 11, 1973 that "I (Goberman) trust the following two persons are in good health (1) your charming wife (2) your beautiful baby . . ."; and a statement in a letter dated January 22, 1973 "Mike, I've at all times done (anything) everything you've asked me to do . . ." The Government concedes that these letters were in an "administrative" file in Washington, D.C. but contends that no promise was made to recover the $60,815 and that the letters themselves and Goberman's institution of the Pennsylvania lawsuit support this contention. The

[2] Defendants also rely upon one letter which was written by Goberman's attorney, H. Joseph Flynn, Esq., on July 31, 1973, to Harold P. McGuire, Jr., the Assistant United States Attorney who represented the Government at trial.

*Appendix B—Opinion of District Court on Motion for New Trial (September 29, 1975)*

Government further contends that in any event the letters are neither 3500 nor *Brady* material. The Government contends also that if the letters were found to be 3500 or *Brady* material, the affidavits of Harold P. McGuire, Jr., the Assistant United States Attorney representing the Government at the trial, and John M. Dowd, the only other Government attorney who participated in the preparation of the trial, establish that failure to turn over these letters was inadvertent and that nothing in them warrants granting a new trial.

The Court notes that Defendants' contentions about Government promises to Goberman to recover his property may arise from the unusual provisions contained in the anti-racketeering statute (18 U.S.C. § 1961 *et seq.*), which provide in section 1963(a) that whoever is convicted thereunder "shall forfeit to the United States" any property acquired in violation of the statute, and in section 1963(c) that the Attorney General is authorized to seize such property and to dispose of it "as soon as commercially feasible, making due provision for the rights of innocent persons."

Of course, these provisions were known to Defendants' counsel at the time of trial and indeed were discussed informally with them by the Court on the question of their applicability to property like the Casino-Hotel, which is located on St. Maarten, Netherlands Antilles, outside the United States and hence outside of its jurisdiction.

In any event, the statute provided adequate basis for cross-examination of Goberman as to whether he expected to get the Casino-Hotel back as an "innocent person" and for argument before the jury that he was testifying for that purpose.

*Appendix B—Opinion of District Court on Motion for New Trial (September 29, 1975)*

Defendants' contention that there is newly discovered evidence demonstrating that the Government promised Goberman that it would recover his Casino-Hotel (or remit the $60,815 taken from Norber) is without merit and does not entitle them to a new trial. A full reading of Goberman's statements at the oral argument on February 24, 1975 before the District Court in New Jersey reveals only that the statements are ambiguous and that Goberman did not understand the legal status of the Casino-Hotel (which appears to have been forfeited to the government of the Netherlands Antilles on Goberman's failure to pay that government over $1-million). It is also noted that nothing in the letters in question suggests the existence of a promise to recover the Casino-Hotel, which promise each of the Government attorneys denies. *See Williams* v. *United States*, 503 F.2d 995 (2d Cir. 1974).

Insofar as Defendants seek a new trial on the basis of the letters found in the files of Goberman's Pennsylvania lawsuit, the Court finds that even assuming (but not so holding) that the letters were 3500 or *Brady* material, there is no basis for granting a new trial.

The Court finds that the Government's nondisclosure of these letters was inadvertent. The letters written by Goberman were each written to Department of Justice attorneys who were not involved in the trial or in its preparation. The one letter written to McGuire, the Assistant United States Attorney who represented the Government at the trial, was sent by J. Joseph Flynn, Goberman's attorney, on July 31, 1973, and merely referred to Goberman's "claim against the Internal Revenue Service for $60,000.00, which Mr. Goberman feels is

owed to the Casino . . ." and does not suggest any promise by the Government to recover the Casino-Hotel for him. Moreover, the affidavits submitted by McGuire and Dowd establish that each was unaware of the existence of those letters which were in an administrative file in Washington, D.C., over which neither had control or responsibility.

Since Defendants have failed to show that "there is a significant chance that [those letters], developed by skilled counsel as [they] would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction," see *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), Defendants are not entitled to a new trial on the basis of the letters.[3]

Accordingly, Defendants' motion for a new trial is denied.

It is so ordered.

Dated: New York, N.Y.
September 29, 1975

DUDLEY B. BONSAL
U.S.D.J.

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[3] The Court also concludes that the findings herein, based upon the parties' extensive briefs and supporting affidavits, satisfy the requirements of *United States* v. *Hilton*, Dkt. No. 74-2675 (2d Cir. Aug. 8, 1975) and *United States* v. *Morell*, Dkt. No. 74-1827 (2d Cir. Aug. 29, 1975).

## APPENDIX C

**Memorandum—Order of Court of Appeals Affirming Denial of New Trial (January 7, 1976)**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed Jan. 7, 1976

A. DANIEL FUSARO, *Clerk*

75-1369, 75-1370

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

MILTON PARNESS and BARBARA PARNESS,

*Defendants-Appellants.*

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of January, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL

*Circuit Judges*

Appeals from the United States District Court for the Southern District of New York.

*Appendix C—Memorandum Order of Court of Appeals Affirming Denial of New Trial (January 7, 1976)*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court entered September 29, 1975 denying appellants' motions for a new trial be and they hereby are *affirmed* on the well reasoned opinion of Judge Bonsal dated September 29, 1975 and upon the authority of the decisions of this Court in *United States* v. *Miranda*, Dkt. No. 74-2651 (2 Cir., Dec. 3, 1975), slip op. 6545; *United States* v. *Stofsky*, Dkt. No. 74-1860 (2 Cir., Nov. 7, 1975), Slip op. 515 and *United States* v. *Zane*, 507 F.2d 346 (2 Cir. 1974), cert. denied, — U.S. —. His findings of fact are not clearly erroneous and we agree with the legal standards he applied. The order entered September 2, 1975 denying a motion for reduction or vacation of sentence as to appellant Milton Parness is *affirmed.* The mandate shall issue forthwith.

By: /s/ WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

By: /s/ ELLSWORTH A. VAN GRAAFEILAND
ELLISWORTH A. VAN GRAAFEILAND

By: /s/ THOMAS J. MESKILL
THOMAS J. MESKILL
*Circuit Judges*

## APPENDIX D

**Memorandum—Order of Court of Appeals Denying Stay of Mandate (January 12, 1976)**

UNITED STATES COURT OF APPEALS

FOR THE SECOND DISTRICT

September Term, 1975

(Submitted January 9, 1976 Decided January 12, 1976)

Docket Nos. 75-1369, 75-1370

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

MILTON PARNESS and BARBARA PARNESS,

*Defendants-Appellants.*

Before:

TIMBERS, VAN GRAAFEILAND and MESKILL, Circuit Judges.

Motion to recall and stay mandate following our unanimous affirmance by memorandum order entered January 7, 1976 of orders of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *District Judge*, entered September 29, 1975 and September 2, 1975, denying both appellants' motions for a new trial and denying appellant Milton Parness' motion for reduction or vacation of sentence; our order of January 7, 1976, which also directed that the mandate issue forthwith, having followed our earlier unani-

mous affirmance on June 27, 1974 of appellants' convictions, after jury trial before Judge Bonsal, of causing interstate transportation of stolen property, of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, and (in the case of appellant Milton Parness) of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity. 503 F.2d 430, *cert. denied*, 419 U.S. 1105 (1975).

Motion to recall and stay mandate denied.

Joel N. Rosenthal, Asst. U.S. Atty., New York, N.Y. (Thomas J. Cahill, U.S. Atty., Lawrence B. Pedowitz and John C. Sabetta, Asst. U.S. Attys., New York, N.Y. on the brief), *for appellee.*

Jay Goldberg, New York, N.Y. (Michael Ratner and Henry J. Boitel, New York, N.Y., on the brief), *for appellant Milton Parness.*

John L. Pollok, New York, N.Y. (Edward Gasthalter, and Gasthalter & Pollok, New York, N.Y. on the brief), *for appellant Barbara Parness.*

Per Curiam:

The chief significance of the instant motion to recall and stay the mandate is that it is the latest in a series of maneuvers to avoid surrendering to serve a ten year sentence imposed by Judge Bonsal *more than 25 months* ago upon appellant Milton Parness who was presented as a dangerous special offender. We deny the motion.

In affirming by a memorandum order on January 7, 1976 appellants' latest appeal from orders denying their

latest motions for a new trial and for reduction or vacation of Milton Parness' sentence, we found their claims of error to be so frivolous that we ordered that the mandate issue forthwith. For the same reason, we deny the instant motion to recall and stay the mandate.

Our affirmance of January 7, 1976, so far as the appeals from the denials of new trials are concerned, was based on the well reasoned opinion of Judge Bonsal of September 29, 1975. Specifically, we held that "[h]is findings of fact are not clearly erroneous and we agree with the legal standards he applied." Such affirmance, moreover, was upon the authority of three recent decisions of our Court, including *United States* v. *Zane*, 507 F.2d 346 (2 Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), where Judge Medina for a unanimous Court stated:

> "The function of the Court of Appeals is to decide whether the trial judge has applied these criteria and whether his finding that the application of these criteria required a denial of the motion is or is not clearly erroneous. It is not our function to speculate on the possibility that a jury on a new trial might acquit the defendants. . . . It is especially important that this separate consideration of the respective functions of the trial judge and of an appellate court be made in Rule 33 cases involving long complicated trials." 507 F.2d at 347-48.

In emphatically denying the instant motion to recall and stay the mandate, we also do not blind ourselves to the prior criminal record of appellant Milton Parness dating back to 1958. His record includes two prior felony convictions, in 1963 and 1965, for conspiring to trans-

port, and for transporting, stolen securities in interstate commerce. For these offenses, consecutive sentences totalling nine (later reduced to seven) years imprisonment were imposed. He was released from the United States Penitentiary at Lewisburg, Pennsylvania, on June 6, 1969. *During the period of his mandatory release supervision or parole,* which did not expire until February 1971, *Milton Parness became engaged in the fraudulent scheme for which he was convicted in the instant case,* 503 F.2d at 434-35, and ultimately was sentenced on December 7, 1973 as a third felony offender.

There comes a time in every federal criminal prosecution when a defendant, who has been accorded due process at the three levels of the federal judicial system and whose claims of error have been weighed and found wanting, should be required to serve the sentence which has been imposed upon him according to law. Otherwise, he makes a mockery of federal criminal justice.

We think it is high time that the curtain be brought down on the charade by which appellant Milton Parness —by various motions and frequent substitutions of counsel—has maneuvered for more than 25 months to avoid surrendering to serve his sentence of imprisonment and to avoid paying the $55,000 fine imposed upon him.

We order that appellant Milton Parness surrender forthwith and start serving immediately his ten year sentence of imprisonment; that appellant Barbara Parness start serving immediately her three year sentence of probation; and that both appellants pay forthwith the fines of $55,000 and $6,000, respectively, imposed upon them on December 7, 1973.

*Appendix D—Memorandum Order of Court of Appeals Denying Stay of Mandate (January 12, 1976)*

The motion to recall and stay the mandate is denied in all respects.

This Court will not grant any further motions for recall or stay of the mandate or for stay of execution of the sentences or for stay of this order.

It is so ordered.

## APPENDIX E

### Affidavit of Former Special Attorney Michael B. Pollack

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

*Appellee*

*—against—*

MILTON PARNESS and BARBARA PARNESS,

*Appellants.*

State of New York )
County of New York ) ss.:

MICHAEL B. POLLACK, being duly sworn, deposes and says:

I am presently in the private practice of law with offices at 1345 Avenue of the Americas, New York, New York 10019.

Between August of 1970 and February of 1975, I was a special attorney with the Criminal Division of the Department of Justice assigned to the Eastern District of New York. In connection with my duties in that position, I had occasion in October of 1971 to travel to St. Maarten, Netherlands Antilles. As a result of this trip, upon my return I issued a subpoena returnable November 8, 1971 to one Allan Goberman, a resident of Lancaster, Pennsylvania and a one time owner of the St. Maarten Isle Hotel. Mr. Goberman appeared in the Grand Jury in the Eastern District of New York on November 8, 1971.

*Appendix E—Affidavit of Former Special Attorney Michael B. Pollack*

Subsequent to Mr. Goberman's appearance on this date, I had many personal and telephonic conversations with him relating to the possibility of his testifying for the Government in a criminal prosecution.

In connection with Mr. Goberman's agreement to testify for the Government, he and I agreed that he would be treated fairly as a witness and reimbursed for his out-of-pocket expenses.

Subsequent to my agreement with Mr. Goberman, it was ascertained that the violations of law Mr. Goberman could give testimony about lay within the jurisdiction of a unit within the Department of Justice, commonly known as Strike Force 18, headed by one R. J. Campbell. At that time, Mr. Goberman and all of his work product were turned over to Mr. Campbell for further debriefing and investigation. The outcome of this process was the indictment in *United States of America* v. *Parness*, 73 Cr. 750, in the Southern District of New York. During the period of time while Mr. Goberman was dealing with Mr. Campbell and ultimately with Mr. Campbell and Mr. McGuire of the United States Attorney's Office for the Southern District of New York, he maintained contact with me. Much of his contact, both telephonically and in writing, concerned complaints he had with the way the above-named parties were treating him.

All letters that were written directly to me were forwarded by myself to R. J. Campbell the head of Strike Force 18. Moreover, after receiving any letter which contained an allegation by Goberman that he was being treated unfairly, I telephoned R. J. Campbell and Mr. Goberman's complaints were discussed. I have examined

the Defendant's Appendix at pages J 566, 568, 572, 582 and 609 which contains letters addressed to me; these too, were forwarded by me to R. J. Campbell.

On several occasions, I attempted to arrange a meeting with all parties present so that Mr. Goberman could air his complaints and have each party respond. My requests, however, were always denied.

MICHAEL B. POLLACK

Sworn to before me, this
16th day of January, 1976.

## APPENDIX F

### Constitutional, Statutory and Regulatory Provisions Involved

*United States Constitution*

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Statutes*

18 U.S.C. § 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the

United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered didectly to the defendan for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any

statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91-452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

*Appendix F—Constitutional, Statutory and Regulatory Provisions Involved*

*Federal Rules of Criminal Procedure*

RULE 33, NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

-vs.- : AFFIRMATION OF SERVICE

MILTON PARNESS and :
BARBARA PARNESS,
:

Appellants.
:

----------x

HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York and a member of the Bar of this Court, affirms the following to be true under penalties of perjury pursuant to Rule 2106 CPLR:

1. On January 21, 1976 I served two copies of the Petition for Rehearing and Suggestion for Rehearing En Banc upon Thomas J. Cahill, Esq., United States Attorney for the Southern District of New York, 1 St. Andrew's Plaza, New York, New York 10007 together with one copy of the affidavit of Michael B. Pollack, Esq., in the above noted case by depositing these documents in a post-paid, properly addressed wrapper in an official depository of the United States Post Office Department within the State of New York.

HENRY J. BOITEL

New York, New York
January 21, 1976